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Nos. 03-1116

IN THE SUPREME COURT OF THE UNITED STATES

JENNIFER M. GRANHOLM, GOVERNOR, ET AL.,

Petitioners,

v.

ELEANOR HEALD, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, WASHINGTON, NEW MEXICO, OREGON, AND WEST VIRGINIA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

A. States' Interests Are Not Single-Faceted And Include Both Twenty-First Amendment Authorities And The Nondiscrimination Principle Of The Dormant Commerce Clause 4

1. States' Interests Protected By The Twenty-First Amendment 5

2. States' Have Strong Interests In Nonprotectionism In Commerce 6

a. Product Protectionism Has Negative Impacts On The Interests Of The Source States 6

b. Protectionism Would Return In Several Forms If *Bacchus Imports, Ltd.* Were Overruled 8

B. Michigan's Asserted Regulatory Interests In Discriminating Between In-State And Out-Of-State Wineries In The Context Of Direct Wine Shipments Are Not Substantiated 9

1. Restrictions On Out-Of-State Direct Wine Shipments Are Not Necessary To Prevent Tax Evasion Because The Analysis Of *Quill Corp.* Is Inapplicable To Alcohol Sales 10

2. The Asserted Need For An In-State Presence To Prevent Sales To Minors By Wineries Is Not Substantiated 15

a. While Protecting Minors Is A Matter Of Serious Concern, A Threshold Question Is Whether A Ban On Out-Of-State Shipments Serves That Interest 15

b. Michigan And Its Amici Understate The Deterrence Value Of State Regulations Regarding The Direct Sale Of Wine To Consumers By Out-Of-State Wineries 15

(1) The In-State Or Out-Of-State Origin Of Direct Wine Shipments Does Not Make A Difference In The Efficacy Of Regulatory Efforts To Limit Underage Access To Alcohol 18

(2) A Shipper's License That Allows Access To Markets In Other States Is A Significant Benefit To Small Wineries And Potential Loss Of The License Is A Strong Deterrent To Violations 20

(3) Michigan's Outright Ban Unreasonably Discounts The Collateral Consequences An Out-of-State Winery Could Suffer For Violation Of Michigan's Laws 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

324 Liquor Corp. v. Duffy
479 U.S. 335 (1987) 15

Bacchus Imports, Ltd. v. Dias
468 U.S. 263 (1984) 2, 7-9, 12

Bainbridge v. Turner
311 F.3d 1104 (11th Cir. 2002) 11

Baldwin v. G.A.F. Seelig, Inc.
294 U.S. 511 (1935) 6

Bolick v. Roberts
199 F. Supp. 2d 397 (E.D. Va. 2002), *order vacated by Bolick v. Danielson*
330 F.3d 274 (4th Cir. 2003) 10

Dickerson v. Bailey
212 F. Supp. 2d 673 (S.D. Tex. (2002), aff'd,
336 F.3d 388 (5th Cir. 2003) 5

Fueston v. City of Colorado Springs
713 P.2d 1323 (Colo. Ct. App. 1985) 24

Hostetter v. Idlewild Bon Voyage Liquor Corp.
377 U.S. 324 (1964) 22

North Dakota v. United States
495 U.S. 423 (1990) 6

Quill Corp. v. North Dakota
504 U.S. 298 (1992) 2, 3, 10-12

State Bd. of Equalization v. Young's Market Co.
299 U.S. 59 (1936) 7

Constitutional Provisions

U.S. Const. amend. XXI 1-6, 9, 12, 13, 15

U.S. Const. amend. XXI, § 2 5

U.S. Const. art. I, § 8 ..... 2-5, 7, 12, 13, 15

Statutes

Federal Alcohol Administration Act
(U.S.C. Title 27, ch. 8) 25
27 U.S.C. § 204(d) 25

Ariz. Rev. Stat. § 4-203.04(C) 25

Cal. Bus. & Prof. Code § 23661.2(b) 23

Cal. Food & Agric. Code § 74802 8

Colo. Rev. Stat. Ann. § 12-47-104(1) 23

Del. Code Ann. tit. 4, § 104(a) 24

Del. Code Ann. tit. 4, § 104(b) 24

Idaho Code § 23-1309A(3) 23

235 Ill. Comp. Stat. 5/6-29(b) 23

La. Rev. Stat. Ann. § 26:359(G) 25

Mich. Comp. Laws Ann. § 436.1203(2)(f) 19

Mo. Rev. Stat. § 311.462(2) 23

N.H. Rev. Stat. Ann. § 178:27(V) 13

N.H. Rev. Stat. Ann. § 178:27(VIII) 24

N.M. Stat. Ann. § 60-7A-3(E) 23

N.C. Gen. Stat. § 105-113.83(b) 13

Or. Rev. Stat. § 471.229(3) 23

S.C. Code Ann. § 61-4-747(C)(4) 13

Wash. Rev. Code § 15.88.010(2) 8

Wash. Rev. Code § 66.12.200 23

W. Va. Code § 60-8-6(b) 24

Wyo. Stat. Ann. § 12-2-204(d)(v) 13

Treatises

Laurence H. Tribe, *American Constitutional Law* (3d ed. 2000) 7

Other Authorities

ATF Industry Circular No. 96-3,
Direct Shipment Sales Of Alcohol Beverages (Feb. 11, 1997), found at http://www.atf.gov/pub/ind_circulars/ic_96-3.htm 26

Eric L. Martin,
A Toast To The Dignity Of States: What Eleventh Amendment Jurisprudence Portends For Direct Shipment Of Wine,
31 Hofstra L. Rev. 1303 (Summer 2003)..... 20, 22

Federal Trade Commission, Staff Report,
Possible Anticompetitive Barriers To E-Commerce: Wine (July 2003), found at www.ftc.gov/os/2003/07/winereport2.pdf..... 14, 18, 26

Lloyd C. Anderson,
Direct Shipment Of Wine, The Commerce Clause And The Twenty-First Amendment: A Call For Legislative Reform,
37 Akron L. Rev. 1 (2004) 11

Note,
Economic Localism In State Alcoholic Beverage Laws—Experience Under The Twenty-First Amendment,
72 Harv. L. Rev. 1145 (1959)..... 9

Op. Att'y Gen. 161, 1992 WL 573160
(Mich. 1991-1992)..... 9

Prepared Statement Of The Federal Trade Commission Before The Subcommittee On Commerce, Trade, And Consumer Protection Committee On Energy And Commerce United States House Of Representatives, October 30, 2003, found at http://www.ftc.gov/os/2003/10/031030ecommercewine.htm..... 14

Stuart M. Maxey,
Sour Grapes: Reflections On The Circuit Split On Direct Shipment Of Wine, The Commerce Clause, And The 21st Amendment, State Tax Notes 45
(July 5, 2004)..... 10, 12

Timothy F. Malloy,
Regulation, Compliance And the Firm,
76 Temp. L. Rev. 451 (Fall 2003)..... 16

Vijay Shanker,
Alcohol Direct Shipment Laws, The Commerce Clause, And The Twenty-First Amendment,
85 Va. L. Rev. 353 (Mar. 1999)..... 18, 19

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INTEREST OF THE AMICI CURIAE

This amici curiae brief is submitted on behalf of the states of California, Washington, New Mexico, Oregon, and West Virginia. The *amici* states have each determined that they will allow direct shipments of limited quantities of wine to consumers for personal use and that their interests in revenue collection and preventing underage access to wine can be met through regulatory controls rather than barring direct sales by all out-of-state wineries. The amici states have adopted reciprocity laws, allowing direct wine shipments from states which do not close their markets to interstate wine shipments and applying the same regulatory provisions as are applied to their in-state wineries. Additionally, wineries in some of the amici states ship their product to other states that allow direct shipments under permitting laws that address tax collection and verification of the age of the recipient of the product.

The amici states are all sovereign states that regulate the sale of alcohol pursuant to their authority under the Twenty-first Amendment to the United States Constitution. These states have strong interests in collecting tax revenues associated with alcohol sales and in preventing the access of minors to alcohol. The amici states also have a strong interest in avoiding economic protectionism that discriminates against the products of their residents.

SUMMARY OF ARGUMENT

The Twenty-first Amendment enables states to regulate importation of alcohol to a degree that

would otherwise be impermissible under the dormant Commerce Clause and allows states to structure systems of alcohol regulation, including the three-tier distribution system adopted in many states. However, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984), the Court held the Twenty-first Amendment does not allow state laws that constitute "mere economic protectionism". This holding protects important state interests in the free flow of commerce and should not be overruled as urged by Michigan and its amici. Otherwise, as historical laws illustrate, protectionism would return in many forms and would have the negative impacts that accompany such barriers.

States with statutory schemes that permit in-state wineries to directly ship alcohol to consumers but restrict similar shipments by out-of-state wineries commonly argue these laws are justified by the limits of their regulatory reach. Michigan and its amici states assert two such bases for its outright ban on out-of-state direct shipments. First, they argue an in-state presence is needed to require out-of-state wineries to collect their sales or use taxes. Second, they argue an in-state presence provides the only effective regulatory hammer if there are illegal sales of alcohol to minors.

With regard to collection of taxes, the Court should dispel the mistaken assumption that a state would not be able to collect taxes on sales of wine by out-of-state shippers. The Court's holding in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), that a state cannot tax a vendor whose only contacts are by mail or common carrier did not address the interplay of the Twenty-first Amendment and the Commerce

Clause. If the choice posed by the interplay of the Twenty-first Amendment and the Commerce Clause is allowing states to impose tax collection responsibilities on out-of-state wineries, or alternatively allowing them to ban direct shipments from these wineries altogether, the value of both provisions obviously is better served by the first alternative. It would be ironic indeed if the *Quill Corp.* holding, based on avoiding undue burdens in interstate commerce, stood as justification for state laws that preclude such commerce altogether. Indeed, several states have adopted laws that require out-of-state shippers to collect and remit state taxes. Dispelling the mistaken assumption that *Quill Corp.* governs wine shipments also removes any doubt about the enforceability of these laws.

With regard to underage access to alcohol, Michigan and its amici suggest that unless a state bans direct shipments from out-of-state wineries such sales will be "virtually unregulated".[1] This claim is countered by the fact a number of states allow direct shipments under successful regulatory programs. Additionally, the claim that only in-state wineries can be deterred from providing wine to minors ignores the circumstances of the direct wine shipment market. Wineries have a significant economic interest in being allowed to sell wine to consumers of other states. There is little risk they would put such direct shipping licenses in peril in order to make incidental sales on those rare occasions when minors would seek to obtain access to

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[1] Br. Amici Curiae Ohio, et al. at 14.

wine through such sales. And in-state controls on deliveries are the same whether the product is from in-state or out-of-state wineries. Further, violations of Michigan laws could have collateral consequences for non-Michigan wineries, since such violations could be a basis for license actions in other states, including a winery's home state. The claim that effective regulation requires an in-state presence is not substantiated in the context of direct wine shipments to consumers for personal use.

ARGUMENT

A. States' Interests Are Not Single-Faceted And Include Both Twenty-First Amendment Authorities And The Nondiscrimination Principle Of The Dormant Commerce Clause

States have an interest in controlling importation of alcohol into the state under the Twenty-first Amendment and also have an interest in the flow of commerce among the states. Consideration of the effect of the Twenty-first Amendment on the operation of the nondiscrimination principle of the dormant Commerce Clause is not a single-faceted "states' rights" issue as some have suggested.[2] Rather, the

[2] *See* Eric L. Martin, *A Toast To The Dignity Of States: What Eleventh Amendment Jurisprudence Portends For Direct Shipment Of Wine*, 31 Hofstra L. Rev. 1303, 1305 (Summer 2003) (concluding that states' prerogatives under the Twenty-first Amendment should not overcome the Commerce Clause's purpose of eliminating economic protectionism in the direct shipment of wine, but observing the Court may view the Twenty-first Amendment as being preeminent because it "implicates the sovereignty of the states").

states have interests that are implicated by each of these provisions and by their interplay.

1. States' Interests Protected By The Twenty-First Amendment

The Twenty-first Amendment enables states to regulate importation of alcohol to a degree that might otherwise be impermissible under the dormant Commerce Clause. Section 2 provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

Many states have used their authority under the Twenty-first Amendment to establish a three-tiered system to control the distribution of alcoholic beverages. Under a three-tiered distribution system, alcohol producers provide their product to wholesalers and distributors, who in turn may provide alcohol to retailers, who then sell to consumers. The three-tiered distribution system is generally a way to structure the liquor industry in an orderly market system that serves state interests in preventing alcohol abuse or evasion of taxation. The three-tiered system addresses a concern that if these various tiers were to collapse and be controlled by the same entities, the system would foster organized crime and create incentives to encourage alcohol abuse. *See Dickerson v. Bailey*, 212 F. Supp. 2d 673, 679-80 & n.11 (S.D. Tex. (2002), aff'd, 336 F.3d 388 (5th Cir. 2003). A state has broad authority to regulate alcohol under the Twenty-first Amendment,

and nobody seriously questions that the three-tiered system is constitutional regardless of any incidental burden on interstate commerce. *Cf. North Dakota v. United States*, 495 U.S. 423, 431-33 (1990) (plurality opinion). The three-tiered system is not at issue here.

This dispute is over a regulatory exception from a state's three-tiered system. Many states have recognized that they can meet their regulatory concerns *and* allow direct shipments of wine to consumers, in limited quantities for their personal use. While many states do so without discriminating against out-of-state wineries, Michigan has chosen to except only its own wineries and open Michigan's slice of the personal use wine market to them in a manner that it forbids to out-of-state wineries.

Michigan's discriminatory exception for its own wineries implicates another state interest: the interest in nonprotectionism in commerce.

2. States' Have Strong Interests In Nonprotectionism In Commerce

a. Product Protectionism Has Negative Impacts On The Interests Of The Source States

When the dormant Commerce Clause addresses laws that block the flow of commerce into a state, the affected interests are not just one of state versus federal power, but also of "one state in its dealings with another". *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). The exercise of state authority under the Twenty-first Amendment demonstrates the different state interests involved. Early Twenty-first Amendment jurisprudence

provided states with virtually unlimited power to prevent imported liquors from competing with domestic liquors on equal terms. *See State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). The opposite side of this coin was that states were virtually powerless to prevent economic protectionism that discriminated against their own breweries or wineries. As summarized by Professor Tribe: "It was long unclear whether the amendment empowered states to regulate importation beyond the degree reasonably necessary to control the level of liquor consumption within the state's boundaries. Some early cases suggested that the state's power extends well beyond such control, even authorizing political trade wars among the states". Laurence H. Tribe, *American Constitutional Law* § 6-24 (3d ed. 2000).

However, in *Bacchus Imports, Ltd.*, the Court held that "[s]tate laws that constitute mere economic protectionism" can violate the Commerce Clause. *Bacchus Imports, Ltd.*, 468 U.S. at 276. A contrary holding, "would revive the spectre of balkanized commerce which haunted the framers and motivated the commerce clause itself". Tribe, § 6-24.

The spectre of protectionism that forecloses some wineries from participating in the national economy presents this concern for wine-producing states. Wine exports contribute substantial economic benefits to these states, particularly in providing employment and a stable economy in rural and agricultural communities. The legislatures of these states have clearly recognized the substantial benefits provided to their residents by wine grape growing and wine production, including sales for

export to other states.[3] Thus, these states have a strong interest in ensuring that laws that prevent the direct shipment of wine to consumers in other states do not constitute "mere economic protectionism". *See Bacchus Imports, Ltd.*, 468 U.S. at 276.

b. Protectionism Would Return In Several Forms If *Bacchus Imports, Ltd.* Were Overruled

Michigan and its amici ask the Court to overrule *Bacchus Imports, Ltd.* Pet'rs Br. at 28-29; Br. Amici Curiae Ohio, et al. 10. They offer no evidence to dispute the *Bacchus Imports, Ltd.* Court's conclusion that "one thing is certain: The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition." *Bacchus Imports, Ltd.*, 468 U.S. at 276. But if *Bacchus Imports, Ltd.* were overruled, such protectionism would blossom.

History illustrates this point. In the past, a number of states have imposed differential excise taxes on locally produced and imported wines, or

[3] For example, in Wash. Rev. Code § 15.88.010(2), the Washington Legislature declares: "The sale in the state and export to other states and abroad of wine made in the state contribute substantial benefits to the economy of the state, provide a large number of jobs and sizeable tax revenues, and have an important stabilizing effect on prices received by agricultural producers." In Cal. Food & Agric. Code § 74802, the California Legislature finds: "The maintenance and expansion of the winegrape industry of California and of its local, national, and foreign markets is necessary to assure the consuming public of a continuous supply of these products and needed levels of income for those engaged in the winegrape industry in this state."

have provided lower license fees for wineries using domestic agricultural products. *See* Note, *Economic Localism In State Alcoholic Beverage Laws—Experience Under The Twenty-First Amendment*, 72 Harv. L. Rev. 1145, 1151 nn.51-52, 1153 n.69 (1959) (citing statutes that provided preferential excise tax rates for domestic wines, different state-controlled price markups, or lower license fees for wineries using domestic agricultural products). The central principle of *Bacchus Imports, Ltd.* has resulted in the repeal of many of these provisions. For example, a provision of the Michigan Liquor Control Act subjected wines manufactured from grapes or fruits not grown in Michigan to a higher tax rate than that imposed on "all wines manufactured in Michigan from grapes grown in Michigan". Op. Att'y Gen. 161, 1992 WL 573160 *1 (Mich. 1991-1992). In 1992, a Michigan Attorney General Opinion concluded this tax preference discriminated against interstate commerce in violation of the Commerce Clause, citing *Bacchus Imports, Ltd. Id.* at *1-*2.

The holding of *Bacchus Imports, Ltd.* is sound and protects the free flow of commerce without undercutting any of the purposes of the Twenty-first Amendment. If a state law is upheld on the basis of the Twenty-first Amendment, it should be based on regulatory needs rather than protectionism.

B. Michigan's Asserted Regulatory Interests In Discriminating Between In-State And Out-Of-State Wineries In The Context Of Direct Wine Shipments Are Not Substantiated

Michigan asserts two regulatory interests in support of its ban on out-of-state direct wine

shipments: revenue collection and preventing underage access to alcohol by requiring an in-state presence. However, its central concern with regard to revenue collection is based on a misassumption that a state lacks the authority to require out-of-state wineries to collect its taxes on wine sales. Further, its assertion that only in-state wineries can be prevented from providing wine to minors is unsubstantiated.

1. Restrictions On Out-Of-State Direct Wine Shipments Are Not Necessary To Prevent Tax Evasion Because The Analysis Of *Quill Corp.* Is Inapplicable To Alcohol Sales

Michigan claims that the ban on direct shipment by out-of-state wineries to consumers in that state is necessary to accomplish that state's legitimate concern of tax collection. Similarly, its amici Ohio suggests that "in a direct-shipping world, the State may have no way to collect a sales tax from the winery at all. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 315-18 (1992)."[4] Br. Amici Curiae

[4] Others have made this same assumption. *See Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002) (citing *Quill Corp.* for proposition that Virginia had no right to collect sales taxes from out-of-state entities for delivery of wine directly to Virginia consumers), *order vacated as moot by Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003); Stuart M. Maxey, *Sour Grapes: Reflections On The Circuit Split On Direct Shipment Of Wine, The Commerce Clause, And The 21st Amendment*, State Tax Notes 45, 51 (July 5, 2004) (arguing the state would not be able to tax an out-of-state direct shipper of alcohol if *Quill Corp.* applies, and therefore "the discriminatory ban would seem to implicate the core concern of revenue raising and would be saved under the *Bacchus* . . . approach"). Some have adopted a different assumption—that out-of-state shippers could be required to collect taxes. *See Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002) ("Why, exactly, must Florida engage in this discriminatory scheme to effectuate its desire to raise revenue? What is so unique about the geographic location of out-of-state wineries that makes taxing them so difficult that they are forced (unlike their in-state counterparts) into the three-tier distribution system? After all, in-state wineries are taxed directly, and this alternative therefore appears to be a viable substitute to the three-tier taxation scheme. So why can't out-of-state firms be taxed directly, just like in-state wineries?" (Footnote omitted.)); Lloyd C. Anderson, *Direct Shipment Of Wine, The Commerce Clause And The Twenty-First Amendment: A Call For Legislative Reform*, 37 Akron L. Rev. 1, 36 (2004) (out-of-state vendors as a condition of direct shipping could, as an additional condition, be required to collect and remit state taxes now collected by wholesalers and retailers).

Ohio, et al. at 25. These arguments are based on the flawed assumption that Michigan lacks the authority to require out-of-state wineries to collect its sales or use taxes.

In *Quill Corp.*, the Court adopted a bright-line rule that the Commerce Clause required a business to have a substantial nexus with a state beyond contacts by mail or common carrier before the state could require the business to collect its sales or use taxes. *Quill Corp.*, 504 U.S. at 313-16. On its face, *Quill Corp.* did not apply to interstate shipment of alcohol and its application is manifestly dubious in that context.

The rule of *Quill Corp.* was established for the explicit purpose of removing impediments to interstate commerce. The Court observed that "[u]ndue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the

actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation." *Quill Corp.*, 504 U.S. at 314-15. Such a bright-line rule is appropriate under the Commerce Clause because it "fosters investment by businesses and individuals". *Id.* at 316. The Court noted: "Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*." *Id.*

Given the rule's underpinnings, it would be illogical and ironic were the rule used to justify protectionism. Instead of fostering interstate commerce, the inability to tax would justify limits on such commerce.[5] Furthermore, *Quill Corp.'s* rationale is substantively undermined in this context by the fact that the Twenty-first Amendment uniquely empowers a state to "burden" the importation of alcohol into the state to some degree, so long as that "burden" is not "mere economic protectionism". *Bacchus Imports Ltd.*, 468 U.S. at 276.

In this case, permitting Michigan to impose its taxes on out-of-state wineries fulfills the values of both the Twenty-first Amendment and the

[5] One commentator has suggested that a state would use *Quill Corp.* to justify a ban on direct shipping. "Under the *Bacchus* two-step approach, a state should argue that its core concern is revenue raising, and that under *Quill*, it cannot tax an out-of-state direct shipper; therefore, the state's only reasonable alternative is to ban direct shipping." Maxey, at 51.

Commerce Clause. Allowing tax collection meets Michigan's legitimate concerns about state revenue. It also fulfills the values of the Commerce Clause by increasing the flow of interstate commerce. It makes little sense to conclude that limits on extraterritorial tax collection implicates the Twenty-first Amendment and empowers a state to ban all direct interstate shipping—a ban that would otherwise violate the Commerce Clause—on the grounds the Commerce Clause does not authorize a state to impose a tax collection responsibility on an out-of-state seller.

Indeed, a number of states have imposed tax collection or payment responsibilities on out-of-state shipper licensees. *See* N.H. Rev. Stat. Ann. § 178:27(V) ("Direct shippers shall file invoices for each shipment with the liquor commission showing the retail price of the product, and shall pay a fee of 8 percent of the retail price for shipments of liquor, wine, beer, or beverage to the commission."); N.C. Gen. Stat. § 105-113.83(b) ("The excise taxes levied under G.S. 105-113.80(b) on wine shipped directly to consumers pursuant to G.S. 18B-1001.1 must be paid by the wine shipper permittee."); Wyo. Stat. Ann. § 12-2-204(d)(v) (out-of-state shippers of manufactured wine must remit a tax of twelve percent of the retail price for each shipment of manufactured wine to the liquor division); S.C. Code Ann. § 61-4-747(C)(4) (out-of-state shipper must pay all sales taxes and excise taxes due on sales to residents of the state, with the taxes to be calculated as if the sale were made in the state at the location where delivery is made). States that require out-of-state permittees to collect and remit taxes on direct

shipments reported few or no problems with tax collection when asked about their experiences in an FTC survey. FTC staff summarized some of the responses:

> "Nebraska, for example, reports that they 'have also not, as yet, had any problems with the collection of excise taxes.' North Dakota reports that 'Taxes are collected. No problems to date that we are aware of.'" Prepared Statement Of The Federal Trade Commission Before The Subcommittee On Commerce, Trade, And Consumer Protection Committee On Energy And Commerce United States House Of Representatives, October 30, 2003 (footnote omitted), found at http://www.ftc.gov/os/2003/10/031030ecommercewine.htm.

The New Hampshire Liquor Commission reported that it collects an eight percent fee and that "[w]hen the NH Liquor Commission discovers an improper shipment we contact the company and inform them of the laws in NH. Once the company learns of NH laws they normally get a permit or stop shipping into NH." Federal Trade Commission, Staff Report, *Possible Anticompetitive Barriers To E-Commerce: Wine* 38 (July 2003), found at www.ftc.gov/os/2003/07/winereport2.pdf (FTC Report). In fiscal year 2002, $91,716 was collected for shipments for personal use into New Hampshire. FTC Report, App. B, FTC Questionnaire To States, New Hampshire Letter.

2. The Asserted Need For An In-State Presence To Prevent Sales To Minors By Wineries Is Not Substantiated

a. While Protecting Minors Is A Matter Of Serious Concern, A Threshold Question Is Whether A Ban On Out-Of-State Shipments Serves That Interest

Underage access to alcohol is a matter of serious concern. Michigan does indeed have an interest in protecting minors, as all states do, and this interest falls within the Twenty-First Amendment. A threshold question, however, is whether Michigan's discriminatory bar against out-of-state wineries, but not its own, serves that interest. On this record, Michigan's interests are unsubstantiated and, thus, fail even to present a conflict between the Twenty-First Amendment and the dormant Commerce Clause. *Cf. 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 349-51 (1987) (scrutinizing the record to determine whether state's alleged interest under Twenty-First Amendment was substantiated).[6]

b. Michigan And Its Amici Understate The Deterrence Value Of State Regulations Regarding The Direct Sale Of Wine To Consumers By Out-Of-State Wineries

Michigan and its amici contend that states have inadequate means to enforce their liquor

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[6] This is not to say there would not be situations in which the regulatory purposes served by an in-state presence requirement could be supported, such as a substantiated need to hold or inspect the product in-state.

regulations against out-of-state wineries. Pet'rs Br. at 33; Br. Amici Curiae Ohio, et al. at 10. Amici Ohio, et al., go so far as to state:

> "States have only two choices: restrict direct shipments by out-of-state wineries or leave this potentially dangerous product virtually unregulated as long as it is shipped directly to a consumer from out of state." Br. Amici Curiae Ohio, et al. at 14.

Of course, this statement is belied by the fact a number of states allow direct shipments under regulations that have proved to be components of a successful regulatory program.

Recent studies of the direct wine shipments and underage access reflect some of the reasons such regulatory programs are successful. The effectiveness of deterrence for commercial activity is derived from examining the costs of noncompliance as compared to the potential benefits of noncompliance. *See* Timothy F. Malloy, *Regulation, Compliance And the Firm*, 76 Temp. L. Rev. 451, 453-54 (Fall 2003).[7] Commercial entities are effectively deterred from engaging in activity where the costs exceed the benefits. Wineries have much to lose and little to gain from noncompliance with regulations concerning sales to minors. Wineries need a market for their product, and direct shipment

[7] Some scholars have noted that a firm's compliance decisions can also be influenced by the firm's drive to obey the law, sometimes called the "compliance norm", and that expanded outreach and education efforts are methods that appeal to the regulated community's law abiding nature. Malloy, 76 Temp. L. Rev. 451 at 455.

to consumers is the only meaningful access for small wineries. The risk of losing access to that market through the loss of a shippers' license to out-of-state markets far outweighs any benefit they would receive by selling wine to minors. Further, violations of one state's laws regarding sales to minors could have collateral consequences for licenses in other states, adding a further measure of disincentive to violate a direct shipper's license.

Certainly, deterrence of future violations is an important function of a state regulatory scheme. But a claim of inadequate deterrent regulatory reach must be examined in the concrete context of the particular interests and penalties faced by the potential violators. Here, that context involves wineries that make direct shipments, in limited quantities, to consumers for their personal use. Michigan's categorical ban as a means of securing compliance with its alcohol shipping laws unreasonably discounts (1) the limited potential benefit to a winery from engaging in conduct that would result in shipments to minors; (2) the importance of out-of-state markets to the small winery, and thus the severity of the consequence of losing a shippers' license; and (3) the range of legal consequences that suspension or discipline of a Michigan shipper's license could have for a non-Michigan winery.

(1) The In-State Or Out-Of-State Origin Of Direct Wine Shipments Does Not Make A Difference In The Efficacy Of Regulatory Efforts To Limit Underage Access To Alcohol

Several features of direct wine shipments make them an unlikely source for minors seeking to evade laws limiting their access to alcohol.[8] Direct shipment of wine to consumers generally involves "high-end, expensive wines". FTC Report at 27. The product of small vineyards and wineries is necessarily more expensive to produce, and shipments of bottles or individual cases is necessarily a more expensive shipping method. Such purchases also involve a waiting period while the product is shipped, rather than instant access to the wine. As noted in the FTC Report, "[m]inors would have to pay a hefty premium, from 33-83%, to purchase a bottle of wine costing less than $20 online and have it delivered to them via 2nd Day Air." FTC Report at 33. One commentator observed that the expense and delay in delivery associated with direct wine shipments make this an unattractive avenue for underage access.

> "Moreover, it seems disingenuous to claim that a minor who wishes to obtain alcohol would order expensive wine or beer and wait several

[8] In 1997 testimony before the California Legislature, the Chief Deputy Director of the California Department of Alcoholic Beverage Control stated that, in the preceding 20-year period, the Department had never received a complaint about an underage person receiving wine by direct shipment. *See* FTC Report at 32 tbl.3, App. B, FTC Questionnaire To States, California Testimony at 54-55.

> days for shipment. While 'skipping the middleman' is usually equated with lower prices, consumers who rely on direct shipments do not do so to save money. Directly-shipped wines tend to be more expensive because the purchasers, usually wine connoisseurs, rely on direct shipping to obtain rare wines produced by small wineries. The evidence simply does not bear out the claims of the proponents of direct shipment restrictions." Vijay Shanker, *Alcohol Direct Shipment Laws, The Commerce Clause, And The Twenty-First Amendment*, 85 Va. L. Rev. 353, 359 (Mar. 1999) (footnotes omitted).

Despite the limited appeal to minors of direct wine sales, regulation to prevent underage access is important, and appropriate laws have been put in place by all states that allow intrastate or interstate shipments of wine to consumers. Michigan law requires recorded verification from the individual placing the order by obtaining from him or her an affirmation that he or she is of legal age to purchase alcoholic liquor and that the wine be shipped in a container that "clearly establishes in a prominent fashion that the package contains alcoholic liquor and that the recipient at the time of the delivery is required to provide identification verifying his or her age along with a signature". Mich. Comp. Laws Ann. § 436.1203(2)(f). Michigan considers such measures sufficient to deter minors from ordering in-state wine for direct shipment.

Out-of-state wineries can be required to follow precisely the same procedures and shipping requirements that Michigan requires of its own

producers and shippers. Certainly the in-state or out-of-state origin of the direct shipments does not make a difference to a minor intent on obtaining alcohol, as noted by one commentator:

> "If keeping children from ordering alcoholic beverages online is the true reason for prohibiting direct shipment of wine, then it should not matter whether the wine is being ordered from within or out of the state. Certainly, one cannot imagine it mattering to the children doing the ordering." Susan Lorde Martin, *Wine Wars—Direct Shipment Of Wine: The Twenty-First Amendment, The Commerce Clause, And Consumers' Rights*, 38 Am. Bus. L.J. 1, 7 (Fall 2000).

Whether in-state or out-of-state, Michigan has the ability to require the shipper and delivery service to determine if the purchaser or designated recipient is of legal age and to require labeling on the shipping boxes ensuring the delivery is not to a minor. Michigan could impose such requirements on out-of-state shipments and could take regulatory action against either the out-of-state winery or the shipping company, or both.

(2) A Shipper's License That Allows Access To Markets In Other States Is A Significant Benefit To Small Wineries And Potential Loss Of The License Is A Strong Deterrent To Violations

Michigan argues that an out-of-state winery would not be sufficiently deterred by the possibility of suspension of a Michigan license. It argues that out-of-state suppliers have little incentive to prevent

sales to minors because it can threaten an out-of-state winery with only the loss of a small part of its market, not the loss of a license to produce wine. But this assertion ignores the economic realities faced by small wineries. These small wineries need access to direct consumer markets in other states to be viable.

> "So-called boutique wineries with relatively few cases of wine to sell cannot have a regular network of distributors the way that large producers of alcoholic beverages do. They must rely on selling directly to consumer aficionados. . . .
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> "Most of the wineries in this country, ninety percent of which are located in California, can be characterized as small family farms. They have a small output, typically between a few hundred to a few thousand cases of wine a year; they do not have shelf space; they do not have budgets for advertising or wholesale distributors or even enough product to warrant those things. Furthermore, from a high of over 20,000, there are now fewer than 400 liquor distributors and wholesalers, and their typical retail store customer has only about fifty wines available out of the more than 10,000 produced in this country. Of the approximately 900 wineries in California, only about 150 have national distributors. A wine industry consultant has asserted that the old-style, national distributorship system works well for wineries selling 100,000 cases at

under seven dollars a bottle, but it does not work for wineries selling 500 cases at thirty dollars a bottle." Susan Lorde Martin, 38 Am. Bus. L.J. at 2-4 (footnotes omitted).[9]

If consideration of the interplay of the Commerce Clause and the Twenty-first Amendment occurs in the "context of the issues and interests at stake in any concrete case", *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964), then the importance of out-of-state markets to small wineries must be considered in evaluating the effectiveness of the regulatory measures available to the states. From the perspective of the regulated winery, access to out-of-state consumers is important, and the threat of a license suspension is a strong deterrent.

(3) Michigan's Outright Ban Unreasonably Discounts The Collateral Consequences An Out-of-State Winery Could Suffer For Violation Of Michigan's Laws

Shipping wine in contravention of a state's laws designed to prevent underage access to alcohol could also put a non-resident winery's license at risk in its home state or affect its ability to obtain direct

[9] The geographic distribution of wineries has changed since this article was written in 1999. California remains the premier winegrowing state, but more recent publications indicate that roughly half the nation's wineries are located in California, due to development of wineries in other states. *See* Eric L. Martin *A Toast To The Dignity Of States: What Eleventh Amendment Jurisprudence Portends For Direct Shipment Of Wine*, 31 Hofstra L. Rev. 1303, 1305 (Summer 2003).

shipment licenses from other states. For example, many states require licensed wineries to clearly mark shipping packages to indicate that delivery will not be made to a minor or to an intoxicated person, whether the package is shipped in-state or out-of-state.[10] Violation of such a state law would be the

[10] *See, e.g.*, Cal. Bus. & Prof. Code § 23661.2(b) ("The shipping container of any wine sent into or out of this state under this section shall be clearly labeled to indicate that the package cannot be delivered to a minor or to an intoxicated person."); Colo. Rev. Stat. Ann. § 12-47-104(1) ("The shipping container of any vinous liquors sent into or out of this state under this section shall be clearly labeled to indicate that the package cannot be delivered to a minor."); Idaho Code § 23-1309A(3) ("The shipping container of any wine sent into or out of this state under this section must be clearly labeled to indicate that the container contains alcoholic beverages and cannot be delivered to a person who is not at least twenty-one (21) years of age."); 235 Ill. Comp. Stat. 5/6-29(b) ("The shipping container of any wine sent into or out of this State under this Section shall be clearly labeled to indicate that the package cannot be delivered to a person under the age of 21 years."); Mo. Rev. Stat. § 311.462(2) ("The shipping container of any wine sent into or out of this state under this section shall be clearly labeled to indicate that the package cannot be delivered to a person under the age of twenty-one years or to an intoxicated person."); N.M. Stat. Ann. § 60-7A-3(E) ("The shipping container of any wine sent into or out of this state under this subsection shall be labeled clearly to indicate that the package cannot be delivered to a minor or to an intoxicated person."); Or. Rev. Stat. § 471.229(3) ("The shipping container of any wine or cider sent into or out of this state under this section must be clearly labeled to indicate that the container contains alcoholic beverages and cannot be delivered to a person who is not at least 21 years of age or to a person who is visibly intoxicated."); Wash. Rev. Code § 66.12.200 ("The shipping container of any wine sent into or out of this state under RCW 66.12.190 shall be clearly labeled to indicate that the package cannot be delivered to a person under twenty-

basis for action on the license issued by the home state. Additionally, some states have explicit provisions requiring licensees to comply with the laws of other states.[11] Some states require licensees to show their licensing, including relicensing, is in the public interest.[12] Violations of shipping laws of other states designed to protect minors would be relevant to licensing decisions based on this standard. Actions in violation of a direct shippers' license in one state may also put at risk the ability of the winery to obtain a license to ship to another

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one years of age or to an intoxicated person."); W. Va. Code § 60-8-6(b) ("The shipping container of any wine sent into or out of this state under this subsection shall be clearly labeled to indicate that the package cannot be delivered to any person under the age of twenty-one or to an intoxicated person.").

[11] Del. Code Ann. tit. 4, § 104(a), (b) ("No sale of alcoholic liquor shall be made to a person in a state or a division of a state where such sale is prohibited by law."; "No shipment of alcoholic liquor shall be made into a state or into a division of a state where such shipment is prohibited by law."); N.H. Rev. Stat. Ann. § 178:27(VIII) ("Upon notification by authorities in another state which imposes a reciprocal enforcement policy, a New Hampshire licensee proved to be making illegal direct shipments to consumers and licensees in said state shall be subject to action by the liquor commission. Such actions may include fines and suspension and revocation of New Hampshire liquor licenses.").

[12] *See, e.g., Fueston v. City of Colorado Springs*, 713 P.2d 1323 (Colo. Ct. App. 1985) (documentation from Washington State Liquor Control Board indicating that licensee was associated with bar in that state whose license was cancelled supported nonrenewal of Colorado license under statute that prohibited anyone from holding a liquor license unless his "character, record, and reputation" are satisfactory to the licensing authority).

state.[13] Indeed, a state can ensure that violations of its regulations will not go unnoticed by other jurisdictions.[14]

An additional deterrent is the Federal Alcohol Administration Act, chapter 8 under U.S.C. Title 27. Under this federal law, a basic permit is required to engage in the business of distilling spirits or producing wine. Basic permits are conditioned upon compliance "with the twenty-first amendment and laws relating to the enforcement thereof". 27 U.S.C. § 204(d). Consequently, the Alcohol And Tobacco Tax And Trade Bureau (formerly the Bureau Of Alcohol, Tobacco And Firearms) could take administrative action against a basic permit if a

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[13] Ariz. Rev. Stat. § 4-203.04(C) ("The director may refuse to issue a direct shipment license for good cause. After a hearing, the director may suspend or revoke a direct shipment license for good cause. The director shall not issue a direct shipment license to any person who: 1. Has had a direct shipment license or any license to deal in spirituous liquor revoked in this state or any other state within one year preceding the application.").

[14] *See* La. Rev. Stat. Ann. § 26:359(G) ("Upon determination by the secretary of the Department of Revenue that an illegal sale or shipment of alcoholic beverages has been made to a consumer in Louisiana by either a manufacturer or retailer of such alcoholic beverages, the secretary shall notify both the Bureau of Alcohol, Tobacco, and Firearms of the United States Department of the Treasury and the licensing authority for the state in which the manufacturer or retailer is domiciled that a state law pertaining to the regulation of alcoholic beverages has been violated and shall request those agencies to take appropriate action.").

winery were to ship products into a state in violation of that state's laws.[15]

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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[15] See ATF Industry Circular No. 96-3, *Direct Shipment Sales Of Alcohol Beverages* (Feb. 11, 1997), found at http://www.atf.gov/pub/ind_circulars/ic_96-3.htm, discussed in the FTC Report at page 10.

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